

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-057

GLENN BELL

APPELLANT

VS. **FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

APPELLEE

*** **

The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated April 26, 2019, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of June, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Fogle
Mr. Glenn Bell
Mr. J. R. Dobner

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This matter came on for evidentiary hearing on January 23, 2019, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Glenn Bell, was present at the evidentiary hearing but was not represented by legal Counsel. The Appellee, Transportation Cabinet, was present at the evidentiary hearing and was represented by the Hon. William Fogle.

By Interim Order dated October 15, 2018, the issue for the evidentiary hearing was whether the Appellant received a rating of "Good" on his employee evaluation in retaliation for having reported his supervisor for time and attendance irregularities. The Appellant was assigned the burden of proof to establish retaliation and to establish the right to any particular relief, which was to be by a preponderance of the evidence.

BACKGROUND

1. The Appellant, Glenn Bell, filed his appeal before the Kentucky Personnel Board on March 27, 2018, alleging his first-line supervisor, Mark Rath, retaliated against him for complaining to the Branch Manager about certain time and attendance issues exhibited by Mr. Rath when he evaluated his work performance as "Good" on his 2017 Annual Employee Performance Evaluation.

2. The first to testify at the evidentiary hearing was **Mr. John Swim**, a Highway Technician III, in Mason County, Kentucky. Mr. Swim stated that he worked with the Appellant during 2017. Mr. Swim testified he never heard the Appellant tell someone not to work with another co-employee. When asked why Mark Rath might be upset with the Appellant, Mr.

Swim testified that everyone noticed that Mr. Rath would come in to work ten or fifteen minutes late every morning.

3. According to Mr. Swim, the Appellant always did what he was told to do while at work and thought he had good Annual Employee Performance Evaluations in the past. According to Mr. Swim, a Heavy Equipment Operator (HEO) usually starts out on mowing tractors, then moves up to operating bigger and heavier equipment and then starts being over other employees. When the Appellant was promoted to an HEO III, then placed back on mowing detail, in Mr. Swim's opinion, it looked more like the Appellant got a demotion instead of a promotion. According to Mr. Swim, the Appellant did not waste time and would always get his job done well and on time. Mr. Swim also testified that he and the Appellant have always worked "pretty good" together.

4. On cross-examination, Mr. Swim testified that he and the Appellant were pretty good friends, although he did not know him until they started working together in Mason County. Mr. Swim also testified that he had no training in performing employee evaluations.

5. The next to testify was **Mr. Victor Kilgore**, who is a Highway Technician Assistant II (HTA II) in Mason County, working on mower support. According to Mr. Kilgore, the Appellant did not have a bad outlook towards his job. He also testified that the Appellant worked well with his coworkers and that he and the Appellant also worked fine together. He also never saw the Appellant wasting time while on the job and never witnessed the Appellant having a negative attitude as the Appellant always showed up, did his job, and then got out of there.

6. When asked why Mr. Rath might have a problem with the Appellant, Mr. Kilgore stated that he had no idea, although he had noticed that Mr. Rath would typically come in to work late.

7. Mr. Kilgore testified that the Appellant had a meeting with Randy Stull, who was second in charge at District 9. This meeting occurred late in the summer at the Appellant's request. According to Mr. Kilgore, the Appellant told Mr. Stull everything, including that the other crew got all the overtime while he and the Appellant hardly got any. He also told Mr. Stull about Mr. Rath coming in to work late and leaving early.

8. On cross-examination, Mr. Kilgore testified that he and the Appellant were pretty good friends. He also testified he had no training in evaluating an employee's work performance.

9. The next to testify was **Tyler Rose**, an HTA II in Mason County. Mr. Rose worked with the Appellant during 2017. According to Mr. Rose, he never noticed that the Appellant had a bad outlook towards his job. He also never witnessed any communication problems with the Appellant's supervisor or heard the Appellant instructing other employees not to do certain work. Mr. Rose also never noticed the Appellant wasting time. Mr. Rose further opined that the Appellant should have received a better performance evaluation score for 2017.

10. On cross-examination, Mr. Rose testified that he and the Appellant were pretty good friends. He also admitted that he had no training evaluating an employee's work performance.

11. The next to testify was the Appellant, **Glenn Bell**, who now works in Robertson County, having been transferred out of Mason County on May 1, 2018. During 2017, the Appellant worked in Mason County as an HEO III. Mark Rath was his immediate supervisor and Barry Fryman was his second-line supervisor. Mr. Bell testified that he hardly ever saw Mr. Fryman because he worked in the District Office in Flemingsburg.

12. Mr. Bell testified that he started work with the state in February of 2014. For the years 2015 and 2016, Bobby Jefferson performed his employee performance evaluations. In both of those years he received scores of "Highly Effective." In 2017, Mark Rath performed his Annual Employee Performance Evaluation and gave him a score of "Good."

13. According to Mr. Bell, he never once complained about his job. He never had a bad outlook towards his job, but admitted that he would worry occasionally about work, or lack of work, being performed by independent contractors. Mr. Bell claimed that any remarks about his communication skills on his 2017 performance evaluation were not true and stated he was not sure how he could have done any better. He also stated that he got along with everybody and would finish his job in a timely fashion. Regarding his alleged negative attitude, the Appellant stated he never knew he had one and had never been told he had one until he received his 2017 Annual Employee Performance Evaluation.

14. The Appellant testified that he noticed Mr. Rath typically got to work about fifteen to twenty minutes late each day and that his sign-in sheet did not reflect that. The Appellant also witnessed Mr. Rath leaving work early. Again, Mr. Rath's timesheets did not accurately reflect this.

15. The Appellant testified that things started to get bad with Mr. Rath when he noticed that a contractor's truck had stayed on-site and never moved all day. The Appellant asked Mr. Rath why the contractor was being paid for working all day without his truck moving. Mr. Rath told him it was none of his business. The Appellant also stated that he never got overtime during the summer months. He would occasionally get overtime during the winter. According to the Appellant, the other crew got overtime about every day. Because of the way Mr. Rath was treating the Appellant, he called Mr. Stull on the phone and asked to meet with him. This meeting occurred in October 2017 and the Appellant told Mr. Stull that he was not being treated fairly or receiving overtime like the other crew members. He also told Mr. Stull about Mr. Rath's time and attendance issues. According to the Appellant, shortly after this meeting, Mr. Rath started showing up early for work. However, Mr. Rath continued to treat the Appellant poorly.

16. According to the Appellant, Mr. Rath prepared his 2017 Annual Employee Performance Evaluation and gave him a rating of "Good". According to Mr. Rath, the Appellant had changed like he had "flipped a light switch" after he had been promoted to HEO III. The Appellant asked his second line supervisor, Barry Fryman, to review the evaluation. According to the Appellant, this was a waste of time and that it was "cut-and-dried," with no changes or additional inquiries having been made. According to the Appellant, his meeting with Mr. Fryman concerning his 2017 performance review lasted five minutes.

17. On cross-examination, The Appellant testified that he started out the 2017 year as an HEO II, but on March 1, 2017, he was promoted to HEO III. Appellee's Exhibit 1 was introduced into the record and demonstrated this promotion. Following the promotion, Mr. Rath became his immediate supervisor and began performing his performance evaluations.

18. Appellee's Exhibit 2 was introduced into the record and is a copy of the Appellant's 2017 Annual Employee Performance Evaluation. According to the Appellant, he did not really look at his July interim review and admitted he usually signs his evaluations without even reading them. There was also no discussion with Mr. Rath about his 2017 interim review. The Appellant just signed his review and went out the door. The Appellant noted that he had not yet complained to Mr. Stull about Mr. Rath's alleged time and attendance issues at the time of his July interim review, but he had already brought up his issue with the independent contractor getting paid despite his truck not moving all day.

19. When asked if he had any evidence that Mr. Rath had been made aware that the Appellant complained to Mr. Stull about his alleged time and attendance issues, the Appellant stated that he did not, but he did notice that Mr. Rath's time and attendance improved shortly after he complained to Mr. Stull.

20. The Appellant's testimony marked the end of his case in chief, at which time the Appellee made its Motion for a Directed Verdict. This motion was **DENIED**.

21. The Appellee's first witness, and the next witness to testify, was **Mr. Mark Rath**, who is the Highway Superintendent II in Mason County. Essentially, he is the main foreman at the Mason County Barn and supervises the employees there and conducts their annual evaluations. Mr. Rath has received "STAR" training and other employee evaluation training.

22. Mr. Rath testified that on March 1, 2017, the Appellant was promoted to HEO III and, from that point forward, he was responsible for performing the Appellant's annual performance evaluations.

23. When asked to review the Appellant's 2017 Annual Employee Performance Evaluation, marked as Appellee's Exhibit 2, Mr. Rath testified that he noticed something changing with the Appellant shortly after his promotion. His attitude and outlook toward the job seemed to change. The Appellant also seemed to have friction with one bunch of employees in the barn, but got along fine with everyone else. Mr. Rath believed that the Appellant's attitude change stemmed from his being put over the mowing crew. He could just tell that the Appellant did not like that.

24. Regarding problems with the Appellant's communication skills, Mr. Rath testified that the mowing crew would get out of the barn quickly in the morning and knew their job. However, although the mowing crew did not need to be closely supervised, he still wanted to be kept abreast of the mowing crew's progress each day and wanted to be told if any other issues cropped up. For instance, whenever there was a breakdown of equipment, the Appellant would just call the mechanic and get the job done without first contacting Mr. Rath. According to Mr. Rath, he wanted maintenance requests to go through him first.

25. Mr. Rath testified that he gave the Appellant a "Good" evaluation for 2017 and that, at the time it was completed, he had not been told that the Appellant had complained about his alleged time and attendance issues.

26. The next to testify was **Mr. Bobby Jefferson**, State Highway Department Superintendent I in Mason County. Mr. Jefferson's job was to go out with various crews and make sure the job was done correctly. Mr. Jefferson performed the Appellant's Annual Employee Performance Evaluations up until March 2017, when the Appellant was promoted to HEO III. Mr. Jefferson observed the Appellant's work performance after his promotion up until

August 2017 (when he received a kidney transplant). He noticed that the Appellant complained about being on the mowing crew and acted like he did not want to do that. Otherwise, he did not notice any issues with the Appellant.

27. On cross-examination, Mr. Jefferson also testified that he noticed the Appellant no longer came to him or Mr. Rath with issues that cropped up during the day. Up until his promotion, the Appellant would always come to him and share workday information.

28. The next to testify was **Mr. Charles Hines**, who is an Investigator for the Transportation Cabinet. Mr. Hines works primarily with the Transportation Cabinet's designated Appointing Authority, J.R. Dobner, investigating allegations made against Transportation Cabinet employees.

29. Mr. Hines investigated Mark Rath in 2018 regarding his alleged time and attendance issues. Appellee's Exhibit 3 was introduced into the record and is a copy of Mr. Hines' investigative report. The report is dated July 19, 2018, and speaks for itself. According to Mr. Hines, the allegations against Mr. Rath concerning his time and attendance issues were not substantiated. Appellee's Exhibit 4 was introduced into the record and is a copy of Mr. Rath's journal notes regarding the Appellant's performance.

30. The Hearing Officer has considered the entire administrative record, including the testimony and exhibits therein.

FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact by a preponderance of the evidence.

1. The Appellant, Glenn Bell, a classified employee with status, timely filed his appeal with the Personnel Board on March 27, 2018, alleging that he received a lower score on his 2017 Annual Employee Performance Evaluation in retaliation for complaining about his first-line supervisor's, Mark Rath, time and attendance.

2. Pursuant to the Interim Order dated October 15, 2018, the issue before the Personnel Board was whether the Appellant received a rating of "Good" on his performance evaluation in retaliation for having reported his supervisor for time and attendance irregularities.

3. The Appellant began the 2017 work year as an HEO II in Mason County, Kentucky, operating heavy equipment. On March 1, 2017, the Appellant was promoted to an HEO III and was assigned to mowing duties.

4. According to the testimony of Mark Rath and Bobby Jefferson, following the Appellant's promotion and assignment to the mowing crew, a change in the Appellant's attitude at work was noticed.

5. The sudden change in the Appellant's attitude began shortly after his promotion to HEO III and was noted in both the Appellant's 2017 interim and annual performance evaluations, marked as Appellee's Exhibit 2, and on Mr. Rath's journal notes marked as Appellee's Exhibit 4.

CONCLUSION OF LAW

The Appellant has failed to demonstrate by a preponderance of the evidence that he was retaliated against by the Appellee when he received a rating of "Good" for his 2017 Annual Employee Performance Evaluation.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **GLENN BELL V. TRANSPORTATION CABINET (APPEAL NO. 2018-057)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 26th day of April, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William Fogle
Glenn Bell
J. R. Dobner